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No. 08-35

IN THE
Supreme Court of the United States

WAYNE STEPHENS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF WAYNE STEPHENS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ..... ii-iii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. City of Bessemer,
470 U.S. 564, (1985) 4

Batson v. Kentucky,
476 U.S. 79 (1986) ..... *passim*

Clark v. Perez,
510 F.3d 382 (2d Cir. 2008) 5

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 6-7

Snyder v. Louisiana,
128 S. Ct. 1203 (2008) 1-2

Sprint/United Mgmt Co. v. Mendelsohn,
128 S. Ct. 1140 (2008) 6-7

United States v. Blotcher,
142 F.3d 728 (4th Cir. 2005) 3

United States v. Lewis,
35 F.3d 148 (4th Cir. 1994) 6

United States v. Stephens,
514 F.3d 703 (7th Cir. 2008) ..... *passim*

United States v. Stephens,
No. 02 CR 661, 2006 WL 1663447 (N.D. Ill. June 9, 2006) 4

United States v. Taylor,
509 F.3d 839 (7th Cir. 2007) 8

United States v. Timely,
507 F.3d 1125 (8th Cir. 2007) 5-6

Whitman v. Bartow,
434 F.3d 968 (7th Cir. 2006) 5

ARGUMENT

Petitioner Wayne Stephens hereby submits his Reply in support of his Petition for a Writ of Certiorari.

1. In his petition, Stephens demonstrated that the Seventh Circuit's decision in *United States v. Stephens*, 514 F.3d 703 (7th Cir. 2008) ("*Stephens II*"), reversing a district court's finding of intentional discrimination in the Government's use of peremptory strikes, conflicts with this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), because the Seventh Circuit: (a) improperly faulted the district court for basing its finding of discrimination on two key justifications offered by the Government, which the district court found pretextual, and (b) independently found that the Government did not discriminate against six minority jurors on Stephens's venire without first determining whether the additional explanations offered by the Government were sufficient, in and of themselves, to justify the Government's strikes. In response, the Government contends that there is no conflict with *Snyder* because the Seventh Circuit never accepted the district court's finding that the Government's two key justifications were pretextual. The Government's argument is without merit.

Contrary to the Government's contention, this case is on all fours with *Snyder*. First, *Snyder* held that a prosecutor's proffered explanation for striking a minority juror based on the juror's student-teaching obligations did not withstand scrutiny because the prosecutor accepted white jurors who disclosed conflicting obligations that appeared "to have been at least as serious." 128 S. Ct. at 1211. Here too, the district court found the Government's two key explanations for striking minority jurors -- their lack of college education and white-collar experience -- pretextual because the Government accepted white jurors who shared the same characteristics and who should have raised similar concerns for the Government. Because the district court's reasoning was consistent with *Snyder*, the Seventh Circuit erred by reversing it.

Second, in *Snyder*, this Court ruled that it could not credit the prosecutors' additional explanation regarding a minority juror's alleged nervousness in the absence of any showing that this rationale alone would have been sufficient to strike the juror. 128 S. Ct. at 1212. Here, however, the Seventh Circuit accepted the Government's additional explanations (including Juror No. 10's alleged facial reaction -- which the district court did not credit and which the Seventh Circuit obviously could not have observed). Yet, the Seventh Circuit never considered whether these additional explanations would have been sufficient, in and of themselves, to justify the strikes. Hence, the

Seventh Circuit's decision clearly conflicts with *Snyder*.

2. In his petition, Stephens demonstrated that the Seventh Circuit's decision to pay "no deference" to the district court's finding of intentional discrimination conflicts with the well-established precedent and creates a split among the circuits. In response, the Government contends that this question does not warrant this Court's review because, even if this Court were to rule that the Seventh Circuit applied incorrect legal standard, this "would not change the outcome in this case" because the Seventh Circuit also stated in *dicta* that the district court's finding would not pass muster under the deferential clearly-erroneous standard. (Brief of the U.S. in Opp. At 12.) The Government relies on *United States v. Blotcher*, 142 F.3d 728 (4th Cir. 1998), but *Blotcher* is inapposite.

In *Blotcher*, the Fourth Circuit held that a district court clearly erred by finding that a defendant intentionally discriminated against a white venire member because the defendant's justification -- that the venire member dressed conservatively -- also applied to the Black venire members who wore ties, but whom the defendant nonetheless accepted. In particular, the Fourth Circuit stated that, "intentional discrimination is not shown by a failure to challenge all jurors with a given characteristic." 142 F.3d at 732. In *Blotcher* though, there was only one "given characteristic" for comparing the accepted Black jurors with a stricken

White juror. Here, in contrast, there were up to four characteristics shared by the accepted White jurors and stricken minority jurors.

For instance, stricken Hispanic Jurors Nos. 9 and 21 shared four characteristics with the accepted White Juror No. 11: no college education; blue-collar experience; spelling mistakes on juror questionnaires; and unresponsive answers during voir dire. Based on this comparison, the district court concluded that "the government has failed to identify a persuasive rationale as to why [White] Juror 11's apparent confusion was any less significant than that of [Hispanic] Jurors 9 and 21," finding that the "confusion rationale," as applied to Jurors 9 and 21, was pretextual. *United States v. Stephens*, No. 02-CR-661, 2006 WL 1663447, at *9 (N.D. Ill. June 9, 2006). As this example demonstrates, the Government cited to multiple characteristics to justify its strikes of minority jurors, and yet White jurors -- of whom the Government struck none, despite having a strike left at the end of voir dire -- showed the same complex of characteristics and still served as jurors.

Because the district court's decision was at a bare minimum "plausible" based on the facts of this case, *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985), the Seventh Circuit erred both by refusing to pay any deference to the district court's findings and stating in *dicta* that these findings were clearly erroneous. Indeed, the Seventh Circuit abused the clearly erroneous standard because a

review for clear error is by nature deferential. Here, however, the Seventh Circuit examined the record *de novo*, without paying any deference whatsoever to the findings of the district court though that court had observed the voir dire first-hand. Hence, contrary to the Government's contention, this Court's clarification of the standard governing appellate review of district courts' *Batson* findings, would change the outcome in this case.

3. In his petition, Stephens demonstrated that the Seventh Circuit's failure to remand to allow the district court to determine in the first instance whether the Government discriminated against minority Jurors Nos. 1, 10, and 27 conflicted with this Court's jurisprudence and with the several decisions of the Second Circuit. In response, the Government acknowledges the conflict with the Second Circuit but nevertheless contends that the Seventh Circuit's ruling falls into the narrow category of cases where remand is unnecessary because it would be futile. The Government's contention is without merit.

First, none of the Court of Appeals cases on which the Government relies involve *Batson* claims. Moreover, in all of them appellate courts were in as good a position as district courts to rule upon issues in question: (a) *Clark v. Perez*, 510 F.3d 382 (2d Cir. 2008), and *Whitman v. Bartow*, 434 F.3d 968 (7th Cir. 2006), involved habeas corpus proceedings where district courts sat in review of state court decisions and thus had no first-hand impressions of

trial proceedings; (b) *United States v. Timely*, 507 F.3d 1125 (8th Cir. 2007), involved a question of law, not of fact, as to whether an attorney's lien on criminal proceeds could prevent forfeiture of those proceeds to the government; and (c) in *United States v. Lewis*, 35 F.3d 148 (4th Cir. 1994), the contested evidence involved a "cold record," i.e. a government's written report, and thus an appellate court was in as good a position to review it as the district court. None of the Government's cases involved a situation where, as here, an appellate court usurped the fact-finding role of the district court which oversaw the jury selection and had the benefit of its first-hand observation in ruling upon a pure issue of fact.

Second, the Government cites *Sprint/United Mgmt Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), and *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), for the proposition that remands are not required "when a reviewing court's examination of the entire record leads it to conclude that there is only one permissible view of the evidence." (Brief of the U.S. in Opp. at 13.) The Government's reliance on these cases is misplaced because, in actuality, their holdings support Stephens's position. In *Sprint*, an employment discrimination case, the Tenth Circuit reversed a district court's evidentiary ruling barring evidence of discriminatory acts of supervisors other than a defendant, and held that such evidence was admissible. This Court vacated the Tenth Circuit's decision and instructed the Tenth Circuit to remand the case to allow the district court to clarify the basis for its ruling. 128 S. Ct. at 1147. Significantly, this

Court stated that the relevant evidence -- pertaining to the ultimate issue of discriminatory intent -- "[was] not of that dispositive character" which would have permitted "only one resolution of the factual issue." *Id.* at 1146 n.3.

Further, in *Pullman-Standard*, another employment discrimination case, the Fifth Circuit -- like the Seventh Circuit here -- engaged in independent examination of the record pertaining to the ultimate issue of discriminatory intent after concluding that a district court made an error of law by failing to consider relevant evidence. This Court reversed the appellate court, calling its failure to remand "incredible," 456 U.S. at 293:

> ... whether an ultimate fact or not, discriminatory intent under §703(h) is a factual matter subject to the clearly erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of fact-finding in the first instance.

The case for a remand here is even more compelling than in *Pullman-Standard* because the district court here did not even make any initial factual findings regarding the Government's intent to discriminate as to minority Jurors Nos. 1, 10, and 27. The district court deemed it unnecessary to do so

given the clear pretext of the Government's explanations for striking minority Jurors Nos. 9, 21, and 36.

Hence, the Seventh Circuit's failure to remand in *Stephens II* calls for the exercise of this Court's supervisory authority because it is in direct conflict with this Court's holdings in *Sprint/United Mgmt Co.* and *Pullman-Standard*.

Third, the Government cites *United States v. Taylor*, 509 F.3d 839 (7th Cir. 2007), to demonstrate that, in appropriate cases raising *Batson* claims, the Seventh Circuit has remanded to allow a district court to determine in the first instance whether there was an intent to discriminate. The Government, however, neglects to mention that the Seventh Circuit's opinion in *Taylor* was authored by Judge Rovner -- the same judge who dissented in this case. Significantly, Judge Rovner criticized the panel's majority here for failing to remand based on precisely the same reasons the court in *Taylor* ordered a remand: "The third step of *Batson* is a credibility determination -- a question of fact. Only the district judge, who observed the voir dire firsthand, can make that determination in the first instance." 509 F.3d at 845 (citation omitted). Here, the district judge did not make such a determination as to minority Jurors Nos. 1, 10, and 27, and hence the Seventh Circuit should have remanded, in accordance with its earlier ruling in *Taylor*. The fact that this decision also creates a split within the

Seventh Circuit further warrants this Court's exercise of its supervisory powers.

CONCLUSION

For the foregoing reasons, Wayne Stephens respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit in this matter.

Respectfully submitted.

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